

File

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Dennis Haug for a Permit)	
to Construct a pond Adjacent to the)	Case No. 3-SD-93-4052
North Branch of the Crawfish River, Town)	
of Otsego, Columbia County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mr. Dennis Haug, W 3762 King Road, Rio, Wisconsin, 53960, filed an application with the Department of Natural Resources on May 7, 1993 for a permit to construct a pond adjacent to the North Branch of the Crawfish River pursuant to sec. 30.19(1), Stats. The proposed project is located in the SE 1/4 of the NE 1/4 of Section 28, Township 11 North, Range 11 East, Columbia County, Wisconsin.

On August 2, 1993, the Department of Natural Resources issued a preliminary decision denying the issuance of the permit to construct a pond adjacent to the North Branch of the Crawfish River.

On August 19, 1993, the Department received a request for a contested case hearing from Mr. Dennis S. Haug pursuant to sec. 227.42, Stats.

On March 27, 1995, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice, hearing was held on December 6, 1995, at Portage, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Dennis S. Haug
W 3762 King Road
Rio, Wisconsin 53960

Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, Wisconsin 53705-7921

FINDINGS OF FACT

1. Dennis Haug (the applicant), W 3762 King Road, Rio, Wisconsin, 53960, filed an application with the Department of Natural Resources on May 7, 1993 for a permit to construct a pond adjacent to the North Branch of the Crawfish River. The applicant owns real property located in the SE 1/4 of the NE 1/4 of Section 28, Township 11 North, Range 11 East, Columbia County, Wisconsin, in the Town of Otsego.

2. The applicant proposes to construct a pond by excavating an area 80' by 160' to a depth of 8 feet. The proposed pond site is in a sedge-meadow type wetland approximately 75 feet from the North Branch of the Crawfish River, which is navigable in fact near the project site.

3. The purpose of the proposed project is to create a pond for wildlife habitat. The applicant also intends to construct a berm and bridge which would permit access to upland crop areas on the south side of the river that does not currently have any access on the Haug property. Mr. Haug has been accessing these areas by traversing a neighbor's property with the neighbor's permission. The present hearing and decision relate to a permit to construct a pond and does not cover any proposed construction of a bridge over a navigable waterway, which would require a separate permitting process. Construction of a wildlife pond is not wetland dependent activity because such a pond need not be located in a wetland area to fulfill its essential purpose.

4. The proposed pond would alter wetland hydrology and destroy existing wetland vegetation in the proposed project site. The proposed pond is located within a floodway of the North Branch of the Crawfish River. The Department of Natural Resources Area Water Management Specialist, Ron Grasshoff, testified that a washout could result in a connection between the proposed pond and the North Branch of the Crawfish River. The pond construction could therefore result in a discharge of silt, suspended solids and other nutrients into the river thereby damaging water quality of the river.

5. The proposed pond construction would have a detrimental impact on wetland functional values. Grasshoff provided undisputed expert testimony that the flood storage function of the wetland would be adversely impacted because of the risk of unsettling sediment. Grasshoff also cited the risk of a washout in connection with flood storage.

Further, the destruction of vegetation that would reduce the area's ability to store surface water runoff. As noted earlier, the potential for injury to water quality protection is also a serious concern. Grasshoff conducted an assessment of the wetland functional values. He concluded that the area was of high or exceptional significance in terms of providing floral diversity, wildlife habitat, flood and storm water attenuation, water quality protection, shoreline protection and groundwater protection.

6. The wetlands consist of a shrub community dominated by Red Osier Dogwood and American Elm and a deciduous broad-leaved tree community dominated by Black Willow, Silver Maple and Boxelder. The project area also includes the sedge meadow/wet prairie community dominated by carex, stricta, jewelweed, blue vervain, and green bulrush. There is also March marigold present in the spring at the area. The soils are a mucky mix known as palms muck. Grasshoff testified that the soil would be unsuitable for dike construction as the subsoil could become unstable when it became wet. Further, the mucky soil would be unsuitable for construction of a dike as it would be subject to erosion especially floodwaters from the floodway area which could cause the sidewalls of the berm to cave in.

7. The proposed project does not conform to the standards in Ch. NR 103.08(3), Wis. Admin. Code in that significant adverse impacts to the functional values of affected wetlands and significant adverse impacts to water quality or other significant adverse environmental consequences would likely result from construction of the proposed pond and berm.

8. The applicant argues that similar ponds were approved in similar areas, specifically the Peterson property pond. Grasshoff disputed that the Peterson property was on all fours with the applicant's property because the Peterson property abuts a channelized area of the North Branch of the Crawfish River. Further, the Peterson property site was not nearly as pristine and diverse a wetland complex as the Haug site. The Peterson project consisted primarily of disturbance species. Grasshoff testified that the Haug site was a relatively rare (for the area) and unusually diverse sedge meadow wetland area. Further, there is testimony that the laws had changed since approval of the Peterson pond project. Based on the record as a whole, a clear preponderance of the credible evidence indicates that the proposed project would not meet the standards set forth in NR 103.08(3), nor those found in NR 299.04 of the Wis. Admin. Code.

9. The applicant has not carried his burden of proof in demonstrating that there are no practical alternatives available which would not have a detrimental impact of wetland functional values or other adverse environmental consequences. Two other upland locations outside the river floodway were suggested to the applicant by the Department. At least one of these would appear to be suitable for the purpose of creating a wildlife pond. Such a site would be far easier to stabilize in terms of preventing erosion into the river. Taken as a whole, the record indicates that there are practical approveable alternative site locations on

the applicant's property which would not detrimentally impact wetlands.

10. The proposed project will adversely affect water quality and would likely increase water pollution in the North Branch of the Crawfish River and would likely cause environmental pollution as defined in subsection 144.01(3), Stats.

11. The Department has evaluated the proposed project in light of the Wisconsin Environmental Policy Act and has determined that the grant or denial of the permit would not be a major state action significantly affecting the quality of the human environment.

12. The subject property itself is not located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code. However there are several areas of special natural resource interest upstream of the proposed project area including a national waterfowl production area due north of the proposed project site.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to requests for construction of pond and water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and NR 299.05(b), Wis. Admin. Code, and sec. 30.19(1), Wis. Stats.

2. The proposed pond construction would be detrimental to public rights and the public interest in navigable waters within the meaning of sec. 30.19(4), Stats.

3. The proposed project would result in violations of the standards contained in sec. NR 103.08(4)(b), Wis. Admin. Code in that the applicant has not demonstrated that there are no alternatives to the proposed project which would not adversely affect wetlands and the proposed project would likely result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences.

4. The Division and the Department of Natural Resources have authority to deny projects pursuant to sec. NR 299.04, Wis. Admin. Code when the project does not comply with the standards enumerated therein. The project does not meet water quality standards for wetlands adopted at NR 103 Wis. Admin. Code under authority of sec. 144.025(2)(b), Stats.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the application to construct a pond at the project site described above be denied and IT IS FURTHER ORDERED that the petition for review be dismissed with prejudice.

Dated at Madison, Wisconsin on January 16, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.